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8                   UNITED STATES DISTRICT COURT  
9                   WESTERN DISTRICT OF WASHINGTON  
10                  AT TACOMA

11                  SARAH M. L'ITALIEN,

12                  Plaintiff,

13                  v.

14                  NANCY A BERRYHILL, Acting  
15                  Commissioner of Social Security,

16                  Defendant.

17                  CASE NO. 3:17-CV-05327-DWC

18                  ORDER REVERSING AND  
19                  REMANDING DEFENDANT'S  
20                  DECISION TO DENY BENEFITS

21                  Plaintiff Sarah M. L'italien filed this action, pursuant to 42 U.S.C. § 405(g), for judicial  
22                  review of Defendant's denial of Plaintiff's applications for supplemental security income ("SSI")  
23                  and disability insurance benefits ("DIB"). Pursuant to 28 U.S.C. § 636(c), Federal Rule of Civil  
24                  Procedure 73 and Local Rule MJR 13, the parties have consented to have this matter heard by  
the undersigned Magistrate Judge. *See* Dkt. 6.

21                  After considering the record, the Court concludes the Administrative Law Judge ("ALJ")  
22                  erred in his consideration of medical opinion evidence. Had the ALJ properly considered two  
23                  physician opinions, the residual functional capacity ("RFC") may have included additional  
24                  limitations. The ALJ's error is therefore not harmless, and this matter is reversed and remanded

ORDER REVERSING AND REMANDING  
DEFENDANT'S DECISION TO DENY BENEFITS

1 pursuant to sentence four of 42 U.S.C. § 405(g) to the Acting Commissioner of Social Security  
2 (“Commissioner”) for further proceedings consistent with this Order.

3                   FACTUAL AND PROCEDURAL HISTORY

4                 On October 9, 2007, Plaintiff filed applications for SSI and DIB, alleging disability as of  
5 June 1, 2006. *See* Dkt. 9, Administrative Record (“AR”) 63. Plaintiff has had three ALJ hearings.  
6 ALJ Robert M. McPhail held the first hearing on November 3, 2009. AR 78-122. On March 25,  
7 2010, ALJ McPhail issued an unfavorable decision, finding Plaintiff not disabled. AR 63-73. The  
8 Appeals Council denied review of ALJ McPhail’s decision. AR 52-54. Plaintiff thereafter sought  
9 judicial review of the ALJ’s decision in the United States District Court for the Western District  
10 of Washington. *See* AR 535-37. On November 28, 2011, the Court issued an Order remanding  
11 the case to the Commissioner for further administrative proceedings because portions of the  
12 hearing recording were inaudible. AR 538-41.

13                 ALJ David Johnson held a second hearing on September 6, 2012. AR 123-78. At the  
14 hearing, Plaintiff amended her alleged onset date of disability to December 31, 2009. *See* AR  
15 135, 744. On September 27, 2012, ALJ Johnson issued another unfavorable decision, finding  
16 Plaintiff not disabled. AR 29-45. Plaintiff sought judicial review of the ALJ’s decision for the  
17 second time, and the Court remanded the case to the Commissioner for further administrative  
18 proceedings. *See* AR 846-60.

19                 ALJ Johnson held the third hearing in this matter on October 12, 2016. AR 771-815. In a  
20 decision dated January 6, 2017, ALJ Johnson again determined Plaintiff to be not disabled. AR  
21 744-61. Plaintiff did not seek review by the Appeals Council, making the ALJ’s decision the

1 final decision of the Commissioner. *See* AR 741-42; 20 C.F.R. § 404.981, § 416.1481. Plaintiff  
2 now appeals ALJ Johnson's January 6, 2017 decision.<sup>1</sup>

3 In Plaintiff's Opening Brief, Plaintiff maintains the ALJ erred: (1) in his treatment of the  
4 medical opinion evidence; (2) by not giving clear and convincing reasons for discounting  
5 Plaintiff's subjective symptom testimony, and not giving germane reasons to reject lay witness  
6 testimony; and (3) by making an RFC and Step Five findings that were unsupported by  
7 substantial evidence. Dkt. 15, pp. 2, 3-18.

8 STANDARD OF REVIEW

9 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of  
10 social security benefits if the ALJ's findings are based on legal error or not supported by  
11 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th  
12 Cir. 2005) (citing *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)).

13 DISCUSSION

14 **I. Whether the ALJ properly considered the medical opinion evidence.**

15 Plaintiff argues the ALJ erred in his consideration of the medical opinion evidence. Dkt.  
16 15, pp. 2-7. Specifically, Plaintiff argues the ALJ erred in his treatment of medical opinion  
17 evidence from (1) Dr. James Parker, M.D., (2) Dr. Kimberly Wheeler, Ph.D., (3) Dr. Leilani  
18 Oana, Ph.D., (4) Dr. Jeff Bremer, Ph.D., (5) Dr. Melinda Losee, Ph.D., (6) Dr. Miller ("Rocky")  
19 Garrison, Ph.D., (7) Dr. Jan Lewis, Ph.D., and (8) Dr. Mary Gentile, Ph.D. *Id.* at 3-7.

20 The ALJ must provide "clear and convincing" reasons for rejecting the uncontradicted  
21 opinion of either a treating or examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.  
22 1996) (citing *Pitzer v. Sullivan*, 908 F.2d 502, 506 (9th Cir. 1990); *Embrey v. Bowen*, 849 F.2d

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24 <sup>1</sup> When stating "the ALJ" or "the ALJ's decision" throughout this Order, the Court is referencing ALJ  
Johnson and his January 6, 2017 decision.

1 418, 422 (9th Cir. 1988)). When a treating or examining physician's opinion is contradicted, the  
2 opinion can be rejected "for specific and legitimate reasons that are supported by substantial  
3 evidence in the record." *Lester*, 81 F.3d at 830-31 (citing *Andrews v. Shalala*, 53 F.3d 1035,  
4 1043 (9th Cir. 1995); *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)). The ALJ can  
5 accomplish this by "setting out a detailed and thorough summary of the facts and conflicting  
6 clinical evidence, stating [her] interpretation thereof, and making findings." *Reddick v. Chater*,  
7 157 F.3d 715, 725 (9th Cir. 1998) (citing *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir.  
8 1989)).

9           A. Dr. Parker

10           Plaintiff first maintains the ALJ erred in his treatment of examining physician Dr. Parker.  
11 Dkt. 15, pp. 3-4.

12           On April 21, 2012, Dr. Parker performed an evaluation of Plaintiff. *See AR 728-31*. As  
13 part of his evaluation, Dr. Parker reviewed records from two of Plaintiff's previous  
14 psychological evaluations, reviewed her medical and family history with her, discussed her  
15 activities of daily living, and conducted a mental status examination. *See AR 728-31*. In the  
16 mental status examination, Dr. Parker found Plaintiff had normal grooming and hygiene, and was  
17 dressed appropriately. AR 730. Dr. Parker determined Plaintiff's thinking was linear and goal-  
18 directed. AR 730. He also found she was "a bit immature in terms of some of her mannerisms  
19 and gestures." AR 730.

20           Dr. Parker opined Plaintiff had "good attention to detail" and could "do simple and  
21 repetitive tasks with normal pace." AR 731. However, "her accuracy would be diminished as  
22 would her ability to sustain tasks over time." AR 731. In addition, Dr. Parker determined  
23 Plaintiff "would likely be able to do reasonably well in a sheltered work setting." AR 731. Dr.  
24

1 Parker further opined Plaintiff comes “across as younger than her stated age but in the  
2 appropriate work environment would be able to cooperate with supervisors, coworkers and the  
3 public.” AR 731.

4 In his decision, the ALJ summarized Dr. Parker’s examination and findings. AR 756-57.

5 In part, the ALJ wrote:

6 Concerning Dr. Parker’s comment about the need for a sheltered work setting, this  
7 is not given weight as it is inconsistent with the mild GAF score, the claimant’s  
8 ability to perform her daily activities, including riding the bus unassisted, and her  
9 ability to work. Dr. Parker did not explain the need for a sheltered work setting  
10 when the claimant has worked independently in the past. She admitted that she  
11 lost her prior job as a laundry aide due to reasons unrelated to her impairments,  
12 discussed above. Dr. Parker also found that the claimant’s learning disorder was  
13 “by history” only and he did not base this on current testing. It is further unclear if  
14 the sheltered work setting described is consistent with Social Security regulations.  
15 SSR 83-33.

16 AR 757 (internal citations omitted).

17 The ALJ gave no weight to Dr. Parker’s opinion that Plaintiff would “need” a sheltered  
18 work setting for several reasons. *See* AR 757. Plaintiff maintains “none of the ALJ’s reasons for  
19 rejecting this part of Dr. Parker’s opinion are convincing or even legitimate.” Dkt. 15, p. 4.  
20 However, the ALJ and Plaintiff misconstrue Dr. Parker’s opinion. Both the ALJ and Plaintiff  
21 state that Dr. Parker wrote Plaintiff would “need” a “sheltered work setting.” *See* AR 757; Dkt.  
22 15, p. 4. Yet Dr. Parker’s did not opine that Plaintiff *needs* a sheltered work setting; instead, he  
23 merely stated Plaintiff would likely “do reasonably well in a sheltered work setting.” AR 731. As  
24 Dr. Parker did not state Plaintiff was limited to a sheltered work setting, the Court finds his  
statement that Plaintiff would do well in a sheltered work sitting was not a functional limitation.  
Therefore, the ALJ did not need to account for this part of Dr. Parker’s report.

The ALJ gave “[p]artial weight” to Dr. Parker’s remaining opinions, stating:

1       The assessment that the claimant could complete simple and repetitive tasks with  
2       a normal pace and cooperate with others at work is consistent with the  
3       unremarkable examination and the record. It is also consistent with the claimant's  
4       ability to perform work activities. The opinion, however, that the accuracy of  
5       work and an inability to sustain tasks is vague, and he did not provide any  
6       explanation to support this limit. Nonetheless, the above residual functional  
7       capacity accounts for an inability to sustain concentration for extended periods.

5       AR 756-57.

6       The ALJ wrote that although Dr. Parker's opinions that Plaintiff's accuracy and ability to  
7       sustain tasks would diminish over time was "vague," the RFC "accounts for an inability to  
8       sustain concentration for extended periods." AR 757. An ALJ need not accept any opinion from  
9       a physician that "is brief, conclusory, and inadequately supported by clinical findings." *Thomas*  
10      *v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002) (citation omitted). However, an ALJ cannot  
11      discount a physician's opinion in a conclusory manner; rather, the ALJ must state his  
12      interpretations and explain why they, rather than the physician's interpretations, are correct. *See*  
13      *Embrey*, 849 F.2d at 421-22.

14       In this case, the ALJ stated that he accounted in the RFC for Dr. Parker's opinions that  
15      Plaintiff's accuracy and ability to sustain tasks would diminish over time. AR 757. But the ALJ  
16      failed to explain how the RFC accounts for either of these limitations.<sup>2</sup> *See* AR 757. Because the  
17      ALJ claimed he accounted for these findings by Dr. Parker without explaining how he accounted  
18      for them – and not expressly providing for them in the RFC – it is unclear whether the ALJ  
19      discounted these findings. Hence, the ALJ failed to adequately explain his consideration of Dr.  
20      Parker's finding that Plaintiff's accuracy and ability to sustain tasks would diminish over time.

21  
22       <sup>2</sup> The Court notes the RFC provided Plaintiff can perform work that is "quota based" rather than  
23       "production paced," and "does not require extended periods of concentration for more than 2 hours." AR 749. To the  
24       extent the ALJ attempted to account for Dr. Parker's opinions about Plaintiff's accuracy and ability to sustain work  
with these limitations, he failed to explain how these RFC limitations account for Dr. Parker's opinions.  
Accordingly, the ALJ erred. *See Blakes v. Barnhart*, 331 F.3d 565, 569 (7th Cir. 2003) (the ALJ must "build an  
accurate and logical bridge from the evidence to her conclusions so that we may afford the claimant meaningful  
review of the SSA's ultimate findings").

1 As such, the Court cannot determine whether the ALJ properly considered these findings. The  
2 ALJ therefore erred by failing to explain the weight given to this significant probative evidence  
3 from Dr. Parker. *See Flores v. Shalala*, 49 F.3d 562, 571 (9th Cir. 1995) (an ALJ's written  
4 decision must state reasons for disregarding significant probative evidence); *see also Brown-*  
5 *Hunter v. Colvin*, 806 F.3d 487, 492 (9th Cir. 2015) (the ALJ must "set forth the reasoning  
6 behind [his] decisions in a way that allows for meaningful review").

7 Harmless error principles apply in the Social Security context. *Molina v. Astrue*, 674 F.3d  
8 1104, 1115 (9th Cir. 2012). An error is harmless, however, only if it is not prejudicial to the  
9 claimant or "inconsequential" to the ALJ's "ultimate nondisability determination." *Stout v.*  
10 *Comm'r of Soc. Sec. Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006); *see also Molina*, 674 F.3d at  
11 1115. The determination as to whether an error is harmless requires a "case-specific application  
12 of judgment" by the reviewing court, based on an examination of the record made "'without  
13 regard to errors' that do not affect the parties' 'substantial rights.'" *Molina*, 674 F.3d at 1118-  
14 1119 (quoting *Shinseki v. Sanders*, 556 U.S. 396, 407 (2009) (quoting 28 U.S.C. § 2111)).

15 Had the ALJ properly considered all of Dr. Parker's opined limitations, the RFC may  
16 have included additional limitations. For example, the RFC may have expressly included that  
17 Plaintiff's accuracy and ability to sustain tasks would diminish over time. The RFC did not  
18 contain such limitations. Thus, if limitations reflecting Dr. Parker's findings were included in the  
19 RFC and the hypothetical questions posed to the vocational expert, the ultimate disability  
20 determination may have changed. Accordingly, the ALJ's failure to properly consider Dr.  
21 Parker's opinion was not harmless and requires reversal. On remand, the ALJ is directed to  
22 explain his treatment of all of Dr. Parker's opined limitations.

1           B. Dr. Wheeler

2         Next, Plaintiff argues the ALJ erred in his assessment of medical opinion evidence from  
3 examining physician Dr. Wheeler. Dkt. 15, pp. 4-5.

4         On January 18, 2013, Dr. Wheeler conducted a psychological/psychiatric evaluation of  
5 Plaintiff.<sup>3</sup> AR 1087-90. As part of her evaluation, Dr. Wheeler conducted a clinical interview and  
6 mental status examination of Plaintiff. *See* AR 1087-90. Dr. Wheeler opined Plaintiff was  
7 moderately limited in her ability to learn new tasks, communicate and perform effectively in a  
8 work setting, and understand, remember, and persist in tasks by following detailed instructions.  
9 AR 1089. Dr. Wheeler further found Plaintiff moderately limited in her ability to be aware of  
10 normal hazards and take appropriate precautions, complete a normal work day and work week  
11 without interruptions from psychologically-based symptoms, and maintain appropriate behavior  
12 in a work setting. AR 1089. Lastly, Dr. Wheeler determined Plaintiff had marked limitations in  
13 her ability to set realistic goals and plan independently. AR 1089.

14         The ALJ summarized Dr. Wheeler's evaluation, and then stated:

15         Great weight is assigned to this assessment since an objective evaluation was  
16 performed and the mild to moderate limitations are consistent with the record.  
17 The undersigned notes that Dr. Wheeler's comment that no mental disorder  
provided a substantial barrier to work concurs with her earlier opinion and other  
evidence in the record.

18 AR 756.

19         The ALJ gave “[g]reat weight” to Dr. Wheeler's January 18, 2013 evaluation, finding it  
20 consistent with the record. AR 756. The ALJ found Plaintiff had the RFC to perform:

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23         <sup>3</sup> Dr. Wheeler also conducted an examination of Plaintiff on April 2, 2009. AR 471-76. The ALJ discussed  
24 both of Dr. Wheeler's examinations. *See* AR 755-56. Because Plaintiff only claims the ALJ erred in his treatment of  
Dr. Wheeler's January 18, 2013 evaluation, the Court only considers the ALJ's treatment of that evaluation. *See*  
Dkt. 15, pp. 4-5.

1 a full range of work at all exertional levels that is low stress meaning that: it  
2 consists of simple routine tasks that are quota based work rather than production  
3 paced, it does not require extended periods of concentration for more than 2  
hours, it allows demonstrated instructions to learn job tasks, it does not require  
more than occasional adaptation to changes in work processes, it is performed  
where the general public is not typically present, it does not require interaction  
with the general public, it does not require mathematical operations, it does not  
require writing, and it does not require incorporating material the worker has read.  
5

6 AR 749.

7 Despite the ALJ's statement that he gave Dr. Wheeler's opinion "great weight," it is  
8 unclear whether the ALJ included all of Dr. Wheeler's opined limitations in the RFC. For  
9 instance, Dr. Wheeler opined Plaintiff would be moderately limited in her ability to be aware of  
10 normal hazards and take appropriate precautions, but the RFC does not contain any limitation  
11 related to hazards or precautions. *See AR 749.* Moreover, Dr. Wheeler opined Plaintiff would be  
12 moderately limited in her ability to maintain appropriate behavior in a work setting and complete  
13 a normal work day and work week without interruptions from psychologically based symptoms.  
14

15 AR 1089. However, it is unclear how these particular limitations are contained in the RFC. As  
16 such, the ALJ failed to adequately explain his consideration of all of Dr. Parker's opined  
17 limitations, and the Court cannot determine whether the ALJ properly considered these findings.  
18 Thus, it is unclear whether the ALJ intended to discount some of Dr. Wheeler's findings.  
19

20 Accordingly, the ALJ erred by failing to explain the weight given to all of Dr. Wheeler's opined  
21 limitations.

22 Additionally, this error was not harmless. Had the ALJ properly considered Dr.  
23 Wheeler's opinion, the RFC and hypothetical questions posed to the vocational expert may have  
24 included additional limitations. For example, the RFC and hypothetical questions may have  
included limitations reflecting that Plaintiff would be moderately limited in her ability to be  
aware of normal hazards and take appropriate precautions, maintain appropriate behavior in a

1 work setting, and complete a normal work day and work week without interruptions from  
2 psychologically based symptoms. It is unclear whether the RFC and hypothetical questions  
3 contained limitations reflecting these restrictions. Because the ultimate disability determination  
4 may have changed, the ALJ's error was not harmless and requires reversal. On remand, the ALJ  
5 is directed to explain how he accounts for, or discounts, Dr. Wheeler's opined limitations.

C. Drs. Oana, Bremer, Losee, Garrison, Lewis, and Gentile

7 Plaintiff further challenges the ALJ's treatment of Drs. Oana, Bremer, Losee, Garrison,  
8 Lewis, and Gentile. Dkt. 15, pp. 5-7.

9        The Court has determined the ALJ erred in his treatment of Drs. Parker and Wheeler. *See*  
10      Sections I. A. & I. B., *supra*. Specifically, the Court determined the ALJ erred by failing to  
11      adequately explain his treatment all of the opined limitations from Drs. Parker and Wheeler. *Id.*  
12      Because the ALJ’s reconsideration of this medical opinion evidence may impact his assessment  
13      of the remaining medical opinion evidence, the ALJ is directed to re-evaluate all medical opinion  
14      evidence on remand.<sup>4</sup>

**II. Whether the ALJ properly discounted Plaintiff's subjective symptom testimony and the lay witness testimony.**

Plaintiff further alleges the ALJ provided legally insufficient reasons to discount Plaintiff's testimony and the lay witness testimony. Dkt. 15, pp. 7-17. The Court concluded the ALJ committed harmful error in his assessment of the medical opinion evidence. *See Section I.,*  
*supra.* Because the ALJ's reconsideration of the medical opinion evidence may impact his

<sup>4</sup> In the Opening Brief, Plaintiff’s counsel broadly asserted the ALJ erred by giving these non-examining physicians more weight than the examining physicians. See Dkt. 15, p. 7. Although the ALJ must reassess all medical opinion evidence on remand due to his errors on Drs. Parker and Wheeler, the Court notes it will not ordinarily consider issues “that are not specifically and distinctly argued in an appellant’s opening brief.” *Carmickle v. Comm’r of Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir. 2007) (citation and internal quotation omitted); see also *Ludwig v. Astrue*, 681 F.3d 1047, 1054 (9th Cir. 2012) (“The burden is on the party claiming error to demonstrate not only the error, but also that it affected his ‘substantial rights.’”).

1 assessment of Plaintiff's subjective symptom testimony and the lay witness testimony, the ALJ  
2 must reconsider this evidence on remand.

3       **III.     Whether the RFC and Step Five findings are supported by substantial**  
4       **evidence.**

5       Plaintiff also asserts the ALJ erred because the RFC and Step Five findings are  
6 unsupported by substantial evidence. Dkt. 15, pp. 17-18.

7       The ALJ committed harmful error by failing to adequately explain his consideration of  
8 medical opinion evidence. *See* Section I., *supra*. Accordingly, the ALJ is directed to reassess the  
9 RFC on remand. *See* SSR 96-8p, 1996 WL 374184 (1996) (an RFC “must always consider and  
10 address medical source opinions”); *Valentine v. Comm’r of Soc. Sec. Admin.*, 574 F.3d 685, 690  
11 (9th Cir. 2009) (“an RFC that fails to take into account a claimant’s limitations is defective”). As  
12 the ALJ must reassess Plaintiff’s RFC on remand, the ALJ is further directed to re-evaluate the  
13 findings at Step Five to determine whether there are jobs existing in significant numbers in the  
14 national economy Plaintiff can perform in light of the RFC. *See Watson v. Astrue*, 2010 WL  
15 4269545, at \*5 (C.D. Cal. Oct. 22, 2010) (finding the RFC and hypothetical questions posed to  
16 the vocational expert defective when the ALJ did not properly consider two doctors’ findings).

17       **IV.     Whether the case should be remanded for an award of benefits.**

18       Lastly, Plaintiff requests the Court remand her claim for an award of benefits. Dkt. 15,  
19 pp. 18-19.

20       The Court may remand a case “either for additional evidence and findings or to award  
21 benefits.” *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996). Generally, when the Court  
22 reverses an ALJ’s decision, “the proper course, except in rare circumstances, is to remand to the  
23 agency for additional investigation or explanation.” *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th  
24 Cir. 2004) (citations omitted). However, the Ninth Circuit created a “test for determining when

1 evidence should be credited and an immediate award of benefits directed." *Harman v. Apfel*, 211  
2 F.3d 1172, 1178 (9th Cir. 2000). Specifically, benefits should be awarded where:

3 (1) the ALJ has failed to provide legally sufficient reasons for rejecting [the  
4 claimant's] evidence, (2) there are no outstanding issues that must be resolved  
5 before a determination of disability can be made, and (3) it is clear from the  
record that the ALJ would be required to find the claimant disabled were such  
evidence credited.

6 *Smolen*, 80 F.3d at 1292.

7 The Court has determined, on remand, the ALJ must re-evaluate this entire matter  
8 properly considering the medical opinion evidence. Therefore, remand for further administrative  
9 proceedings is appropriate.

10 CONCLUSION

11 Based on the foregoing reasons, the Court hereby finds the ALJ improperly concluded  
12 Plaintiff was not disabled. Accordingly, Defendant's decision to deny benefits is reversed and  
13 this matter is remanded for further administrative proceedings in accordance with the findings  
14 contained herein.

15 Dated this 2nd day of February, 2018.

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17 \_\_\_\_\_  
18 David W. Christel  
19 United States Magistrate Judge  
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